

Pregnant Persons as a Gender Category: A Trans Feminist Analysis of Pregnancy Discrimination

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1. THE PUZZLE: HOW IS PREGNANCY DISCRIMINATION BASED ON SEX?

The U.S. Supreme Court in *Geduldig v. Aiello* (1974): Discrimination on the basis of pregnancy is *not* discrimination on the basis of sex because pregnancy is unique to women as a gender.

The line between “pregnant women” and “nonpregnant persons” is not the sex line between women and men; it is sex-neutral.

The prevailing feminist response: Discrimination on the basis of pregnancy is discrimination on the basis of sex *because* pregnancy is unique to women as a gender.

“To deprive a woman . . . of disability pay because she is pregnant discriminates on the basis of sex because pregnancy has a *direct* relation to sex, and produces immediate disadvantages for employment for women only—and that is the end of the argument.” (MacKinnon 1979, 123, her emphasis)

Trouble for trans feminism: If pregnancy discrimination disadvantages not just pregnant women but also pregnant men and pregnant nonbinary persons—indeed, *all* pregnant persons—how can pregnancy discrimination be based on sex?

My view: Pregnancy discrimination is based on sex not because pregnancy is unique to women as a gender, but because pregnant persons constitute a gender category of their own.

2. WHAT IS SEX DISCRIMINATION?

Geduldig's account (the “differences” conception): Discrimination is *differential treatment* based on a certain *trait* (itself).

A statute, policy, practice, (in)action, norm, institution, or structure *P* discriminates against *F*s in a *P*-relevant context *C* on the basis of a trait *T* iff_{df} in *C*, *P* treats *F*s differently from similarly situated non-*F*s on the basis of *T*.

MacKinnon's alternative (the “inequality” conception): Discrimination is *systematic disadvantage* based on the *social meaning* of the relevant trait.

A statute, policy, practice, (in)action, norm, institution, or structure *P* discriminates against *F*s in a *P*-relevant context *C* on the basis of a trait *T* iff_{df} in *C*, *F*s are systematically disadvantaged by the social meaning of *T*.

	<i>Differences conception</i>	<i>Inequality conception</i>
<i>Nature of discrimination</i>	Differential treatment	Disadvantageous treatment
<i>Legally relevant meaning of “sex”</i>	Sex as biological difference	Gender as social meaning of sex

3. APPLYING THE INEQUALITY CONCEPTION TO PREGNANCY DISCRIMINATION

One would expect, then, that pregnancy in the sense suitable for an inequality analysis of pregnancy discrimination should too be a *social* status and position.

The disadvantage—hence the injury of pregnancy discrimination—results not from the biological fact of pregnancy, but from pregnancy’s unequal social meaning.

And pregnancy’s unequal social meaning clearly disadvantages not just women.

In fact, pregnancy’s unequal social meaning systematically disadvantages anyone *taken, suspected, or expected* to be, to have been, or to become pregnant—even if they might not in fact be pregnant, or even in fact be capable of becoming pregnant.

Yet, MacKinnon is all too quick to assume that women as a gender are systematically disadvantaged by the social meaning of pregnancy *because* women and only women become pregnant—that is inconsistent even with the commitments of her own inequality conception.

4. PREGNANT PERSONS REDUX

What’s responsible for the *Geduldig* result, I think, is not just the differences conception of discrimination (*pace* MacKinnon), or even just the differences conception of discrimination in conjunction with a cissexist conception of pregnancy as distinctively women’s.

Rather, there is a third assumption implicit in *Geduldig*:

The binary conception of sex/gender: To discriminate on the basis of sex just is to discriminate on the basis of *either* being a woman *or* being a man.

Even on MacKinnon’s account, pregnancy discrimination is based on sex only because pregnancy’s social meaning systematically disadvantages *pregnant persons qua women*.

My proposal: Pregnancy discrimination is based on sex because it bears on the social meaning of sex *directly* and *immediately*, not by way of womanhood.

Pregnant persons is to *women* as *novelists* is to *poets*.

Not to ungender pregnancy (cf. Barnes forthcoming; MacKinnon 1987; Ginsburg 1985).

We end up, then, with a version of the inequality conception of discrimination that adopts these two theses in place of the binary conception of sex/gender and the cissexist conception of pregnancy:

Ontological pluralism about gender categories: There are more gender categories—such as *pregnant persons*—than just *women* and *men*.

Ontological egalitarianism about gender categories: The categories *women* and *men* are no more fundamental than any other gender categories.